Nos. 424 and 425

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1945

No. 424

KENNECOTT COPPER CORPORATION, A CORPORATION,
Petitioner,

vs.

STATE TAX COMMISSION; AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, AND HEBER BENNION, JR., CONSTITUTING SAID STATE TAX COMMISSION,
Respondents.

No. 425

SILVER KING COALITION MINES COMPANY, A CORPORATION,
Petitioner,

vs.

STATE TAX COMMISSION; AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, AND HEBER BENNION, JR., CONSTITUTING SAID STATE TAX COMMISSION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS STATE TAX COMMISSION; AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND MILTON TWITCHELL, AND HEBER BENNION, JR., constituting said STATE TAX COMMISSION

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STATEMENT

The suits here involved were originally commenced in the Federal District Court for the District of Utah by petitioners to recover certain occupation taxes paid to the State Tax Commission of Utah under protest. Respondents appeared and filed a Motion to Dismiss upon the grounds, first, that the court had no jurisdiction for the reason that the

matter involved is not a controversy between citizens of different states in that the suits are, in fact, suits against the State of Utah, and, second, that the court had no jurisdiction over the Defendants for the reason that the State Tax Commission is an agency of the State of Utah and the individual defendants are sued in their representative capacities as members of such Commission. (R. 11, 125)

The District Court overruled respondent's motions. (R. 12, 126). Respondents thereupon filed answers and set up in each case an affirmative defense that the State Tax Commission is not a citizen of the State of Utah or of any state and further, that the individual respondents are sued only in a representative capacity, that the relief sought against them is only in their official capacity as representatives of the State of Utah which alone will be affected or compelled to pay any judgment which might be rendered and to whom alone will inure the benefits to accrue or result from any judgment in their favor; that the suits are barred by the provisions of the 11th Amendment to the Constitution of the United States. (R. 12, 13, 127)

The trial court found the issues in favor of petitioners herein and directed a verdict in their favor. Upon appeal, the judgment of the lower court was reversed on the ground that the suits were, in fact, suits against the State of Utah and the State of Utah has not consented to be sued in the federal courts. (R. 141, et seq.)

The cases are now before this court by way of Certiorari to review the decision of the Circuit Court of Appeals. (R. 152, 153). The sole question for determination is whether the

federal courts lack jurisdiction to entertain the suits here involved. The validity of the occupation tax levied upon petitioners herein and collected by the State Tax Commission is not involved in this controversy. For all intents and purposes, such levy was valid and legal. While it is true, as stated by petitioners, that certain monies received from the United States through Metals Reserve Company were included as a part of the "gross amount received for, or gross value of," the metalliferous ores mined and sold by the respective mining companies, such monies were paid by Metals Reserve Company pursuant to what is known as the "premium price plan" whereby the federal government, through Metals Reserve Company, guaranteed to the several mining companies "premium prices" for their ores produced over and above fixed quotas. (R. 48, 51, 54, 65, 94, 95, 97.)

Summary of Argument

Respondents, in the argument hereinafter set forth, choose to follow the points raised and argued by petitioners relating to the question, first, whether the State of Utah has consented to be sued in the federal courts for the recovery of an occupation tax paid under protest—petitioners apparently conceding for the purposes of this argument that the suits here involved are, in fact, suits against the State of Utah; second, whether these suits are against the State Tax Commission as a legal entity separate and distinct from the state and a citizen of the State of Utah for the purposes of diversity of citizenship; and third, whether the individuals comprising the State Tax Commission are sued in their individual capacities.

Statutes Involved

In addition to those referred to by petitioners, the following constitutional and statutory provisions are important to a proper analysis of the issues presented in these cases:

Section 80-5-67, Utah Code Annotated, 1943, whereby every person engaged in the business of mining or producing metalliferous ore is required to file with the State Tax Commission a statement containing certain information relative to the production of ore during the preceding year.

Section 80-5-68, setting forth the procedure to be followed by the Tax Commission in the event any person fails to file such statement required by Section 80-5-67.

Section 80-5-70, fixing the first day of June, next succeeding the calendar year when the ore or metal is sold, as the date when such tax shall become due and payable.

Section 80-5-72, requiring the State Tax Commission to fix the amount of the occupation tax that each person is required to pay on or before the first Monday in May of each year, and to give notice to the taxpayer accordingly.

Section 80-5-73, authorizing protest and hearing before the Tax Commission in the event any person feels aggrieved because of the amount of the occupation tax assessed against him.

Section 80-5-74, providing for the decision of the Tax Commission to be rendered after any hearing and making the same final unless proper proceedings are instituted to review the same.

Section 80-5-75, outlining procedure for review of the decision of the Tax Commission by the Supreme Court of the State of Utah by writ of certiorari or review.

Section 80-5-77, providing for certain conditions to be met by the taxpayer before making application to the Supreme Court for such a writ.

Section 80-5-78 and Section 80-5-79, outlining procedure to be followed by the State Tax Commission in enforcing payment of the occupation tax by warrant and execution.

Section 80-5-80, authorizing action by the State Tax Commission to enforce collection of the occupation tax "in any court of competent jurisdiction" at any time within six years after the cause shall have accrued.

Section 80-5-82, providing that if any part of the Occupation Tax Act should be adjudged invalid "by any court of competent jurisdiction" such judgment should not affect the balance of said act.

Eleventh Amendment to the Constitution of the United States, wherein it is provided that the judicial power of the United States shall not extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State.

The pertinent portions of the several statutory provisions referred to are set forth in the Appendix, infra, pages I to V.

ARGUMENT

I.

THE PROVISIONS OF THE UTAH STATUTES AUTHORIZING A SUIT "IN ANY COURT OF COMPETENT JURISDICTION" DO NOT WAIVE IMMUNITY BY THE STATE OF UTAH TO SUIT AGAINST IT IN IN THE FEDERAL COURTS.

This argument presupposes that the instant suits are, in fact, suits against the State of Utah. Otherwise, the question of whether the state has or has not consented to be sued in the federal courts and waived its immunity granted by the 11th Amendment of the Constitution of the United States would not be involved. Whether the state has consented to be sued and waived its immunity, insofar as federal courts are concerned, depends upon the construction to be given to the phrase "any court of competent jurisdiction" as used in the Utah statutes relating to suits to recover taxes paid under protest. Sections 80-5-76 and 80-11-11, Utah Code Annotated, 1943.

First, answering petitioners' argument to the effect that the State of Utah has waived its immunity from suit, we cannot agree that the phrase "in any court of competent jurisdiction" as used in Section 80-11-11, Utah Code Annotated, 1943, must be read "any *state* court of competent jurisdiction" to hold that the State of Utah has not waived such immunity. The general and ordinary interpretation given by the courts to the phrase "any court of competent juris-

diction" is that such phrase refers to those courts—whether they be state or federal—which would otherwise have jurisdiction of both the parties and the subject matter concerned. In the case of In re Norton, 64 Kansas 842, 68 P. 639, the court held:

> "We suppose it will be conceded that a court of competent jurisdiction is one provided for in the constitution, or created by the legislature, and having jurisdiction of the subject matter and of the person. In People v. Liscomb, 3 Hun. 769, it was said that a 'competent tribunal' meant a 'tribunal having jurisdiction of the subject-matter and the person'; in Babbitt v. Doe, 4 Ind. 359, it is said that the terms' "competent jurisdiction" in their usual signification, embrace the person as well as the cause'; and in the notes to the McLeod Case, 3 Hill, 665, it was said that, 'if there was no legal power to render the judgment or decree or issue the process, there was no competent court, and consequently no judgment or process."

In the case of Texas Employers Insurance Association vs. Nunamaker, (Texas Court of Civil Appeals) 267 S. W. 749, the court was concerned with an interpretation of the Texas statute providing that a party who did not wish to abide by the decision of the Industrial Accident Board might "bring suit in some court of competent jurisdiction." The court held that such phrase did not confer additional jurisdiction upon county courts. Unless such courts otherwise had jurisdiction of the matter and the parties they could not turn to the statute for power to hear and determine the matter. We quote from the court's opinion as follows:

> "We think the legal effect of a suit to set aside an award of the Industrial Accident Board is to invoke the judgment of the court on the issue of the liability of the insurer, under the provisions of the act,

> upon the facts alleged in the claim presented to said board, and to substitute the judgment of such court when rendered for the prior award of the board. Such being the case, a court of 'competent jurisdiction' within the meaning of the act, is one having jurisdiction under the Constitution and laws of this state to determine whether such liability exists, and if so, the amount thereof."

See also Robinson v. Attapulgus Clay Company, 55 Ga. App. 141, 189 S. E. 555, where the court made the following analysis:

> "Jurisdiction itself is a term that is defined to be 'the power of hearing and determining causes and doing justice in matters of complaint.' Wright v. State, 16 Ga. App. 216, 84 S. E. 975. 'The jurisdiction of a court is determined by its power or its lack of power to deal with a plaintiff's petition.' Garfield Oil Mills v. Stephens, 16 Ga. App. 655, 85 S. E. 983, 986. 'A court of competent jurisdiction is one that has jurisdiction both of the person and the subject-matter.' English v. Central of Ga. Ry. Co., 7 Ga. App. 263, 66 S. E. 969."

To the same effect are the decisions of this court. In the case of Blackburn vs. Portland Gold Mining Co., 175 U. S. 571, (relied upon by petitioners herein), the court was concerned with the question whether the phrase "a court of competent jurisdiction" authorized suit in a federal court notwithstanding the lack of diversity of citizenship. In holding that such phrase did not convey any more jurisdiction upon the federal courts than already existed with respect to the parties litigant, the court stated:

> "We think the intention of Congress, in this legislation, was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of

different States and if the matter in dispute exceeded the sum or value of two thousand dollars, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. *But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed two thousand dollars, then the party claimant could proceed in a state court.*" (Italics Added).

This view was later affirmed in the case of Shoshone Mining Company vs. Rutter, 177 U. S. 506. This case is also cited by petitioners and the language of Mr. Justice Brewer is quoted at Pages 12, 13 of their brief. The determining factor expressed in the opinion is as follows:

"Leaving the matter as it did, it unquestionably meant that *the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts.*" (Italics added.)

The court then makes the following practical analysis:

"In that view, if the adverse suit were between citizens of different States, and the value of the thing in controversy exceeded $2000, then by virtue of the general provisions of the statutes the Federal courts might take jurisdiction, or, if the suit was one arising under the Constitution or the laws of the United States, and the amount in controversy was over $2000, then also the Federal courts might take jurisdiction. Conversely, it would be true that if the amount in controversy was not in excess of $2000, or if the parties were not citizens of different States, and the suit was not one arising under the Constitution or laws of the United States, the Federal courts could not take jurisdiction."

See also Stringer vs. Griffin Grocery Co., (Texas Civil Appeals), 149 S. W. (2d) 158, where it was held:

> "The reasonable interpretation of the phrase, 'any court of competent jurisdiction,' is generally held in both state and Federal courts to mean any Federal, state or territorial court, *whose jurisdiction over cases of like nature is not prohibited by law.*" (Italics added.)

The conclusion to be reached from the foregoing authorities is that whenever the legislature, whether state or federal, uses the term "in any court of competent jurisdiction" with reference to actions which may be brought by parties litigant, such words refer generally to the courts in which the parties litigant would, *without regard to the phrase used*, be entitled to appear and prosecute or defend any action brought. Such words are not words of grant whereby any court, whether state or federal, is vested with greater or additional powers than those which it already possessed. Without specifically enumerating the various courts which may be resorted to by the parties concerned, the legislature merely says that the individuals concerned may go to the proper court to obtain redress for any alleged grievance. Indeed, it would be impossible in many instances, for the legislature to designate specifically which are the proper courts. What may be the proper court to certain parties in certain types of litigation may not be the proper court where the amount involved changes or where different parties are concerned. In the case of Texas Employers Insurance Association vs. Nanamaker, supra, the county court was a court of competent jurisdiction if the amount involved did not exceed a specified amount. Again, in the case of Blackburn vs. Portland Gold Mining Co., supra, even though the statute using the words "court of

competent jurisdiction" was a federal statute, redress in the federal court was denied because there was not diversity of citizenship.

Under the provisions of Section 80-11-11, Utah Code Annotated, 1943, it would not be possible for a person to resort to the federal court in a suit against a county or municipality unless the conditions requisite for federal jurisdiction were otherwise present. So, likewise, suit against the State of Utah is not authorized in the federal court unless the basis for jurisdiction exists independent of the statutory designation that a suit might be brought "in any court of competent jurisdiction." The 11th Amendment prohibiting the federal court from assuming jurisdiction in cases against the State—and the State of Utah not otherwise having consented to be sued in the federal court or conferred jurisdiction on the federal court in such suits, the actions in the instant matter were properly dismissed by the Circuit Court.

That the phrase "any court of competent jurisdiction" is used by way of reference and not by way of granting or conferring additional powers or jurisdiction, is clearly shown by the use of such phraseology in other sections of the Occupation Tax statute, as well as various other legislative enactments. Section 80-5-80, Utah Code Annotated, 1943, (Appendix p. V), authorizes action by the State Tax Commission "in any court of competent jurisdiction" to foreclose a lien for the payment of the occupation tax on a mine or mining claim. If the provisions of Sections 80-5-76 and 80-11-11 authorize suit in a federal court against the State of Utah, then, likewise, Section 80-5-80 must authorize suit in the federal court by the State of Utah. Since, however, the state

courts jurisdiction or power to pass on the constitutionality of the State Irrigation and Conservation District law? Or did the legislature merely use the language in a generic sense without limiting or enlarging powers theretofore held by any court, whether state or federal? See Broadwater-Missouri Water Users' Assn. vs. Montana Power Co., 9th Cir., 139 Fed. (2d) 998.

By Section 3-9-22, Utah Code Annotated, 1943,[2] the legislature authorized any action of the State Board of Agriculture with reference to granting, refusing to grant, or suspending a produce dealer's license to be "reviewed by any court of competent jurisdiction." Did the legislature confer jurisdiction on the federal court to review any action of the State Board of Agriculture and thereby annex the federal district court to the system of state courts for the purpose of administering our local statutes?

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son be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the particular part thereof directly involved in the controversy wherein such judgment shall have been rendered."

[2] Section 3-9-22, U.C.A. 1943.

"Any action of the state board of agriculture with reference to the granting of, or the refusal to grant, or to renew any license, or with reference to the revocation or suspension of any license granted under the provisions of this act, may be reviewed by any court of competent jurisdiction; but pending final determination of any such review, in the case of the revocation or suspension of the license of any person licensed hereunder, such license shall be deemed in full force and effect pending the expiration of the license period or the final determination of such proceedings whichever is first in point of time."

Section 3-10a-16, Utah Code Annotated, 1943,[1] authorizes any order of the State Board of Agriculture substantially affecting the rights of any interested party in connection with the administration of the Milk and Cream Marketing Act to be "reviewed by any court of competent jurisdiction." Such action must be commenced within 90 days from the effective date of the order or after the injurious effect complained of becomes reasonably apparent. Certainly, citizens of this state may not appeal to the federal court to review an order of the State Board of Agriculture in this or any other connection. Nor would a suit by citizens of another state lie in the federal court against the State Board of Agriculture, the latter being an agency of the State and the State of Utah not being a person for the purpose of diversity of citizenship. See also Craig, State Tax Collector of the State of Mississippi vs. Southern Natural Gas Company, 9th Cir., 125 Fed. (2d) 66; Query vs. 206 Cases of Assorted Liquor (D.C.W.D. So. Car.), 49 Fed. Supp. 693.

Petitioners further argue that "there has been a very long-standing and well-recognized judicial and administrative construction of Section 80-11-11, directly contrary to the construction which it was accorded by the majority below." We submit there has been no judicial or administrative construction of Section 80-11-11 which could be interpreted to

[1] See. 3-10a-16, U.C.A. 1943.

"Any order of the state board hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within ninety days after the effective date of the order complained of or within ninety days after the injurious effect complained of becomes reasonably apparent."

authorize a suit against the State of Utah in the federal courts. The cases cited by respondents and appearing on Page 10 of their brief are all suits against the counties or county officers. It is apparent that the question of immunity from suit by the State of Utah could not have been raised in such cases. The fact, therefore, that the Attorney General of this state may have participated in some of those actions gives no weight to any contention that the state has, by administrative construction, authorized suit against it in the federal courts. The Attorney General is given supervisory powers over the county attorneys, "in all matters pertaining to the duties of their offices"[1] and it was, therefore, entirely proper for him to appear as counsel in some of the actions referred to.

Nor do the cases cited on Pages 14 and 15 of petitioners' brief construing the phrase "any court of competent jurisdiction" require a holding in the instant case that the State of Utah has waived its immunity from suit in the federal courts. In the language of counsel's brief, the phrase applies to federal and state courts indiscriminately *only* where the "facts otherwise essential to federal jurisdiction [are] present." The facts otherwise essential to federal jurisdiction not being present in these cases—the State of Utah not having theretofore consented to be sued in the federal courts—the federal district court should not have taken jurisdiction and the cases were properly dismissed by the Circuit Court of Appeals.

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[1] Sec. 87-6-1(5), Utah Code Annotated 1943.

Not only does Section 80-11-11 fail to confer jurisdiction on the federal courts in cases where the State of Utah is a party, but Section 80-5-76, providing that a suit may be brought for the recovery of occupation taxes paid under protest, fails to waive any immunity which the State of Utah may have under the 11th Amendment of the Constitution of the United States. The entire subject matter of this latter section is concerned with the courts "of this state." It reads:

> "No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by Section 80-11-11, Revised Statutes of Utah, 1933."

It would be useless for anyone to attempt to argue that the first part of this section refers to the federal courts for the reason that the language is expressly limited to the courts "of this state." Too, as hereinbefore noted, it would have been useless for the legislature to have attempted to legislate with reference to jurisdiction of the federal courts in such matters—the State of Utah not being a person for the purpose of satisfying the requirement of diversity of citizenship under the federal rules of practice and procedure. How can it then be argued that the second portion of Section 80-5-76 has any wider application than the first part referring

> it is the duty of the Attorney General * * * to exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports as to the condition of public business entrusted to their charge."

to courts of this state. At most, it was a mere designation by the legislature that the aggrieved taxpayer could bring his action in the proper state court in accordance with the provisions of Section 80-11-11—the question of which courts would have jurisdiction not being considered.

The identical phraseology, to-wit, "any court of competent jurisdiction" is used in Section 64-2614(a) of Burns' Indiana Statutes Annotated (1943 Replacement) construed by this court in the case of Ford Motor Company vs. Department of Treasury, 323 U. S. 459, 65 Sup. Ct. 347, 89 L. Ed..... In holding that such language did not authorize a suit in the federal courts, this court affirmed its holding in the case of Great Northern Life Insurance Company vs. Read, 322 U. S. 47, 64 Sup. Ct. 873, 88 L. Ed. 781, as follows:

> "When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the federal court to be astute to read the consent to embrace federal as well as state courts. When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

We submit that a declaration of an intention of the State of Utah to submit its fiscal problems to the federal court is not found in any of the language of our state statutes. On the contrary, the entire procedure set up by statute whereby a taxpayer may obtain a review or hearing on an occupation tax which he claims to have been exacted unlawfully reveals an intent to limit such review or hearing to state courts. Section 80-5-74, Utah Code Annotated, 1943, provides that

the decision of the Tax Commission, after hearing on the matter of the amount of the occupation tax assessment shall become final upon the expiration of 30 days unless within that time proceedings are taken for a review by the Supreme Court upon a writ of certiorari, pursuant to Section 80-5-75. Under the provisions of this latter section, a taxpayer may obtain a writ of certiorari or review from the Supreme Court of the state, but upon such hearing before the Supreme Court, "no new or additional evidence may be introduced, but the case shall be heard on the record made before the Tax Commission as certified to by it." In such case, as a condition precedent to the making of the application to the Supreme Court for the writ, the taxpayer must file an undertaking in sufficient amount to cover the taxes, interest and other charges which have accrued or which may accrue by reason of the application for the writ, or in lieu thereof deposit the amount of such taxes, interest and other charges with the State Tax Commission. (See Section 80-5-77, Appendix, page III.)

In the alternative, however, the taxpayer, instead of applying to the Supreme Court directly for a writ of certiorari to review the decision of the Tax Commission, may pay his occupation tax under protest and "bring an action in any court of competent jurisdiction for the return thereof." This remedy affords the taxpayer the opportunity of presenting evidence before the court and making a record upon which the court may render its decision. But, as a condition precedent thereto, it must pay under protest the tax assessed. Thereafter, an appeal, as in other cases, may be taken to the Supreme Court of the state. This alternative remedy, however, does not contemplate that the taxpayer may go

beyond the state courts in bringing his action for a refund. There is no more reason for construing the language of the statute to authorize suits in the federal court than there is to authorize suits in inferior state courts, such as city courts and justice courts—or as a matter of fact in courts outside the State of Utah. The Silver King Coalition Mines Company is a corporation of the State of Nevada. If, as Petitioners contend, the language "any court of competent jurisdiction" authorizes suits to be brought in any court, state or federal, without limitation, there is no reason why the Silver King Coalition Mines Company might not commence an action in the Federal Court for the District of Nevada contending that such a court is also a court of "competent jurisdiction" within the meaning of the statute. Certainly, such was not the intendment of the legislature in enacting this provision, nor was it intended to enlarge the jurisdiction of the city courts and justice courts of our state to include the recovery of taxes paid under protest. The "courts" contemplated by the statute in which actions such as these may be brought are our state district courts, which, under the Constitution and the statutes of this state "have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law." (Article VIII, Section 7, Constitution of Utah. See also Section 20-3-4, Utah Code Annotated, 1943.)

Because Section 80-11-11, Utah Code Annotated, 1943, provides for actions to recover taxes paid under protest against "the state, county, municipality or other taxing unit on whose behalf the same was collected," it was impossible to designate the particular district court in which such action could be brought. It was certainly not intended that an action

could be brought against a particular county in a state district court other than one in which the county is situated. In each instance the district court of the state in which the county or other taxing unit is situated is the proper court in which to commence the action, it being the court "of competent jurisdiction" referred to in the statute. Likewise, the federal district court might be a "court of competent jurisdiction" in a suit by a taxpayer against a county, if the incidents necessary for its jurisdiction are otherwise present.

It is our belief that the legislature of this state intended to treat all persons concerned in the same manner when it used the language "in any court of competent jurisdiction." That is to say, the statute itself does not give to any party any additional remedy or any right to bring a suit in any court which, under the laws of the United States and the State of Utah, did not otherwise have jurisdiction to hear and determine the matter. Our state legislature could not confer any right on the citizens of this state to bring a suit in the federal district court unless such court had jurisdiction independent of our statute. Likewise, the legislature could not confer authority upon the State Tax Commission to enforce collection of any occupation tax in any federal district court. Certainly, the language of Section 80-5-76 should not be construed to accord greater rights to citizens of foreign states than it did to citizens of this state or to the state itself with reference to the state taxing structure and the various proceedings thereunder.

When the legislature actually intended to waive immunity of this state in connection with suits in the federal court, it had no difficulty in finding express language in which to

do it. By the Laws of Utah, 1939, Chapter 120, the legislature provided that under certain conditions "the consent of the State of Utah is given to be named a party in any suit * * * in any court of this state or of the United States, for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto." It was further provided, however, that "no judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this chapter."[1]

This is the first instance in the history of this state that express authorization has been given to sue the State of Utah in the federal courts. Even then, the type of judgment which may be entered against the state is limited to the kind specified in the statutory provision, and no money judgment is authorized.

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[1]Sec. 104-3-27, U.C.A. 1943.

"Upon the conditions herein prescribed the consent of the State of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved. Service upon the State of Utah shall be made by serving the summons upon the attorney general or his deputy, and it shall be the duty of the attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this chapter nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof."

We repeat, the provision in Sec. 80-5-76 to the effect that a taxpayer may "bring an action in any court of competent jurisdiction" designates the state courts which, without regard to the statutory provision, would already have jurisdiction of the parties and the subject matter. It does not extend the jurisdiction of any state court, nor does it extend the jurisdiction of the Federal courts beyond that which such courts have under the Federal Constitution. We think the decisions of this court in the Ford Motor Company case and the Read case, hereinafter cited, are conclusive on this point. As stated in those cases, such a construction of the state statute "leaves open the road to review in this Court all constitutional grounds after the issues have been passed upon by state courts." There is a distinct advantage in having the state courts pass initially upon questions which involve the state's liability for tax refunds.

See also Minnesota vs. United States, 305 U. S. 382, 59 S. Ct. 292; 83 L. Ed. 235, where conversely to the proposition here urged, the Supreme Court held that a federal statute authorizing condemnation suits with regard to Indian lands did not authorize a suit against the United States in a state court.

II.

THESE ACTIONS AGAINST THE STATE TAX COMMISSION ARE, IN FACT, SUITS AGAINST THE STATE OF UTAH

That the actions here involved are in fact suits against the State of Utah seems readily apparent. A cursory reading of the pleadings in each case will reveal that the tax sought

to be recovered is a state tax levied by the Tax Commission on behalf of the state pursuant to constitutional and statutory authorization. The Tax Commission was created by constitutional amendment in 1930 to replace the State Board of Equalization, the constitutional body theretofore existing since statehood. As such, the Tax Commission took over the functions and responsibilities of the State Board of Equalization to "administer and supervise the tax laws of the State" (Article XIII, Sec. 11, Constitution of Utah). In furtherance of the constitutional provision, the legislature provided for the organization of the Tax Commission, authorized it to sue and be sued, and provided that it might prescribe rules and regulations for its own government and the transaction of its business. (Secs. 80-5-37 to 80-5-47, U. C. A., 1943)

It is respondents' position that the principles announced by this court in the cases of Ford Motor Company vs. Department of Treasury and Great Northern Life Insurance Company vs. Read, supra, apply with equal vigor to the facts in the instant matters.

With reference to the nature of the suit against the Indiana Department of Treasury and the individual members thereof this court in the Ford Motor Company case held:

> "Petitioner's suit in the federal District Court is based on Sec. 64-2614(a) of the Indiana statutes and therefore constitutes an action against the state, not against the collecting official as an individual. Petitioner brought its action in strict accord with Sec. 64-2614(a). The action is against the state's department of treasury. The complaint carefully details compliance with the provisions of Sec. 64-2614(a) which require a timely application for refund to the department as a prerequisite to a court action authorized in the section. It is true the petitioner in the present

proceeding joined the Governor, Treasurer and Auditor of the state as defendants, who 'together constitute the Board of Department of Treasury of the State of Indiana.' But, they were joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought. The petitioner did not assert any claim to a personal judgment against these individuals for the contested tax payments. The petitioner's claim is for a 'refund,' not for the imposition of personal liability on individual defendants for sums illegally exacted. We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. Ex parte Ayres, 123 U. S. 443, 490, 499, 8 S. Ct. 164, 174, 175, 31 L. Ed. 216; Ex parte State of New York, 256 U. S. 490, 500, 41 S. Ct. 588, 590, 65 L. Ed. 1057; Worcester County Trust Co. v. Riley, 302 U. S. 292, 296, 298, 58 S. Ct. 185, 186, 187, 82 L. Ed. 268. *And when the action is in essence one for the recovery of money from the state; the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.* Smith v. Reeves, supra; Great Northern Life Insurance Co. v. Read, supra. We are of the opinion therefore, that the present proceeding was brought in reliance on Sec. 64-2614(a) and is a suit against the state." (Italics added.)

Petitioners' complaints set forth complete compliance with the statutory provisions relative to levy and assessment of the occupation tax, protest of the same by petitioners and request for hearing, denial of petitioners' protest by the Tax Commission and notice thereof, payment of the tax under protest to the State Tax Commission and timely suit to recover the amount alleged to have been unlawfully collected. (R. 8, 9, 122, 123). Speaking of such procedure in the Ford Motor Company case, this court further stated:

> "We are of the opinion that petitioner's suit in the instant case against the department and the individuals as the board constitutes an action against the State of Indiana. A state statute prescribed the procedure for obtaining refund of taxes illegally exacted, providing that a taxpayer first file a timely application for a refund with the state department of treasury. Upon denial of such claim, the taxpayer is authorized to recover the illegal exaction in an action against the 'department.' Judgment obtained in such action is to be satisfied by payment 'out of any funds in the state treasury.' This section clearly provides for an action against the state, as opposed to one against the collecting official individually. No state court decision has been called to our attention which would indicate that a different interpretation of this statute has been adopted by state courts."

While the Supreme Court of Utah has never had occasion to determine whether an action against the Tax Commission is an action against the state, nevertheless, it has been determined that an action against the State Road Commission is such an action against the state. In the case of State by State Road Commission vs. District Court, 94 Utah 384, 78 P. (2d) 502, the State Road Commission sought a writ of prohibition against the District Court to prohibit the latter from proceeding in a case wherein the State Road Commission was a party defendant. The Supreme Court in considering the nature of the suit, insofar as the State Road Commission was concerned, held:

> "The State Road Commission is an agency of the State. It is clothed with certain powers in the nature of corporate powers, but cannot be considered to be a corporation. It may sue in its own name, and section 36-2-1, R. S. Utah 1933, as amended by Laws of Utah 1935, c. 35, provides that it may be sued only on written contracts. Being an unincorporated agency of the

State, a suit against it is a suit against the State. The State cannot be sued unless it has given its consent or has waived its immunity. Wilkinson v. State, 42 Utah 483, 134 P. 626, 631; Campbell Building Co. v. State Road Commission (Utah) 70 P. (2d) 857. Defendants do not argue in their briefs that consent has been given by the State or that there has been any waiver of the State's immunity from suit. Their argument is that the injunction suit is not against the State. We cannot agree with this argument in so far as the Road Commission as such is concerned. It is an agency of the State, and a suit against it is a suit against the State."

As to the individual members of the State Road Commission, the court further stated that if such members "are personally made parties defendant in the injunction suit, the case will be different than if prosecuted against the Road Commission as a body." As to such individual members, the court, on authority of United States vs. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, and Tindal vs. Wesley, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137, determined that the members might be sued individually to enjoin their unlawful acts. As will hereinafter appear with respect to such individual members, however, the State Road Commission case, as above cited, is distinguishable from the cases here involved.

Our statute relative to the creation of the State Road Commission, "at the time the above case was decided, made of it a state agency with powers and duties relative to the construction and maintenance of state roads similar to the powers and duties held by the State Tax Commission relative to the assessment and collection of taxes. Section 36-2-1, R. S. U. 1933, provides for the organization of the State Road

Commission and authorizes it to sue in its own name and to be sued "on written contracts made by it or under its authority." Section 36-2-2 requires it to maintain its offices in the State Capitol and hold regular meetings on dates to be fixed. Section 36-2-3 provides that the Commission shall have power to "administer the state highways and exercise those powers and duties which relate to the termination and carrying out of the general policy of the state relating thereto." Section 36-2-4 outlines additional powers, including the power to formulate and adopt rules and regulations for the expenditure of public funds, for letting contracts for any work which it is authorized by law to do, and for the governing of the use of public roads; the power to prescribe qualifications and duties of all employees and to employ such assistants as may be necessary to carry out their work; and the power to adopt a seal, filing a description and impression thereof in the office of the Secretary of State. With the exception that the State Tax Commission may be sued generally while the State Road Commission may be sued only upon contracts entered into by it, the nature and functions of the two bodies in their respective fields are identical.

We, therefore, have a definite pronouncement by our State Supreme Court to the effect that a suit against a state agency such as the Tax Commission is, in fact, a suit against the State of Utah. Furthermore, in the Ford Motor Company case, this court relying upon the Read case, stated:

> "In that case this Court held that as the suit was against a state official as such, through proceedings which were authorized by statute to compel him to carry out with state funds the state's agreement to reimburse moneys illegally exacted under color of tax power, the suit was one against the state. We

said that such a suit was clearly distinguishable from actions against a tax collector to recover a personal judgment for money wrongfully collected under color of state law. 322 U. S. 47, 50, 51, 64 S. Ct. 873, 874, 875. Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 280, 32 St. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; cf. Matthews v. Rodgers, 284 U. S. 521, 528, 52 S. Ct. 217, 220, 76 L. Ed. 447. Where, however, an action is authorized by statute against a state officer in his official capacity and constituting an action against the state, the Eleventh Amendment operates to bar suit except in so far as the statute waives state immunity from suit. Smith v. Reeves, 178 U. S. 436, 20 S. Ct. 919, 44 L. Ed. 1140; Great Northern Life Insurance Co. v. Read, 322 U. S. 47, 64 S. Ct. 873."

Numerous cases are cited by petitioners to support the proposition that the instant actions are not suits against the State of Utah. Those cases are, however, for the most part, clearly distinguishable from the facts in the instant cases in that they were either suits against the individual to recover specific property wrongfully obtained and held (Tindal vs. Wesley, supra), or suits to enjoin the individual action of state officers who threatened to commit acts of wrong and injury to the right and property of the plaintiff under color of an unconstitutional statute (Pennoyer vs. McConnaughy, 140 U. S. 1, 35 L. Ed. 362).

Several cases are cited and distinguished by this court in its opinion in the Read case as follows:

"The case therefore is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state

law, Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280; cf. Matthews v. Rodgers, 284 U. S. 521, 528; to recover under general law possession of specific property likewise wrongfully obtained or held, Tindal v. Wesley, 167 U. S. 204, 221; Virginia Coupon Cases, 114 U. S. 269, 285; United States v. Lee, 106 U. S. 196; to perform a plain ministerial duty, Board of Liquidation v. McComb, 92 U. S. 531, 541; Rolston v. Missouri Fund Comm'rs., 120 U. S. 390, 411; or to enjoin an affirmative act to the injury of plaintiff, Sterling v. Constantin, 287 U. S. 378, 393; Tomlinson v. Branch, 15 Wall. 460; Davis v. Gray, 16 Wall. 203, 220; In re Tyler, 149 U. S. 164, 190. Only in Smith v. Reeves was the action authorized by statute against the officer in his official capacity. In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally."

The opinion then continues as to suits against the sovereign:

"This ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. Chandler v. Dix, 194 U. S. 590; Fitts v. McGhee, 172 U. S. 516, 529; Murray v. Wilson Distilling Co., 213 U. S. 151, 167; Lankford v. Platte Iron Works Co., 235 U. S. 461, 468 et seq.; Ex parte State of New York, No. 1, 256 U. S. 490, 500; Worcester County Co. v. Riley, 302 U. S. 292, 296, 299. Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. Monaco v. Mississippi, 292 U. S. 313, 320; Lousiana v. Jumel, 107 U. S. 711, 720. A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment.

> The inherent nature of sovereignty prevents actions against a state by its own citizens without its consent. Hans v. Louisiana, 134 U. S. 1, 10, 16."

The following authorities also recognize the distinction between suits against officers as individuals and suits against officials in their representative capacity which are in effect suits against the state: State Highway Commission v. Utah Const. Co., 278 U. S. 194, 49 Sup. Ct. State 104, 73 L. Ed. 262; Smith v. Reeves, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140; People ex rel. McColgan v. Bruce, supra; Query v. 206 Cases of Assorted Liquor, supra; Broadwater-Missouri Water Users Ass'n v. Montana Power Co., supra; Craig v. Southern Natural Gas Co., supra. See, also, the annotation on this subject contained in 147 A. L. R. 786, 794.

Petitioners rely on the case of Thomas v. Ohio State University Trustees, 195 U. S. 207, 49 L. Ed. 160. There the question whether the suit was against the State of Ohio was not raised. On the facts, that case appears to be one against private parties and not against the State of Ohio. Likewise, in the case of Parks vs. Carriere Consolidated School District, 5th Cir., 12 Fed. (2d) 37, the action was against a political subdivision of the state. A school district, like a county or municipality, has long been considered a citizen of the state of its organization.

In the case of Louisiana Highway Comm. vs. Farnsworth, 74 Fed. (2d) 910, the court decided the question of whether the action was against the state upon the authority of the Louisiana case of Saint vs. Allen, 172 La. 350, 134 So. 236. The Circuit Court held:

> "The question whether Louisiana highway commission is or is not subject to be sued on such a contract is one of Louisiana law. * * * It is not denied that, but for the decision rendered in the case of Saint vs. Allen, supra, the decision in the case of State Highway Comm. vs. Utah Const. Co., 278 U. S. 194, 49 Sup. Ct. 104, 73 L. Ed. 262, which was much relied on by counsel for the appellant, would be persuasive in support of a different conclusion."

We submit that the Farnsworth case is contrary to the decision of our State Supreme Court in State by State Road Commission vs. District Court, supra. So, too, the case of Hunkin-Conkey Const. Co. vs. Pa. T. Comm., 34 Fed. Supp. 26, decided by the federal district court, is inconsistent with the decisions not only of this court but of the Supreme Court of the State of Utah.

Petitioners further rely upon the case of State Life Insurance Company vs. Daniel, 6 Fed. Supp. 1015, decided by the District Court for the Western District of Texas. That court determined that an action under the Texas statute referred to was not a suit against the state. However, a contrary holding has since been made by the Court of Civil Appeals of Texas in the case of Hansen vs. Blackmon, 169 S. W. (2d) 955. We quote from the court's opinion as follows:

> "The suit authorized by Sec. 2 of Art. 7057b, R. C. S., Vernon's Ann. Civ. St. Art. 7057b, Sec. 2, is in effect a suit against the State, since judgment in a taxpayer's favor would operate directly as a liability of the State, and must of necessity be paid out of the State Treasury. Natl. Biscuit Co. v. State, Tex. Civ. App., 129 S. W. (2d) 494, reversed on other grounds, 134 Tex. 293, 135 S. W. (2d) 687; 38 Tex. Jur. P. 857, Sec. 36.

"In such a suit the authority granted by the statute is jurisdictional, since it is elementary that the State cannot be sued without its consent."

In the case of State of Missouri vs. Homesteaders Life Association (8th Cir., 90 Fed. (2d) 543, the action was by the Superintendent of the Insurance Department. The court held that the proceeding was not a suit by the State of Missouri for the reason that Section 11276 of the Revised Statutes of Missouri, 1929, as interpreted by the Supreme Court of Missouri in the case of State vs. Williams, 221 Mo. 227, 120 S. W. 740, provided that the Attorney General should institute all suits in the name of the state. Since the Attorney General did not appear in the Homesteaders Life Association case, it did not sufficiently appear that in a "legal and technical sense" the state was a party to the suit.

Again, the decision in the case of Bromwell Brush and Wire Goods Co. vs. State Board of Charities and Corrections (D. C. E. D. Ky.), 279 Fed. 440, was affirmed by the Circuit Court of Appeals for the Sixth Circuit (288 Fed. 1018) upon the narrow ground that:

"* * * the state board of control of the commonwealth of Kentucky had no power to make the contract for whose asserted breach this action was brought, and that the District Court properly sustained, for that reason, defendant's general demurrer to plaintiff's petition and dismissed the cause, the judgment of the District Court of the United States for the Eastern District of Kentucky is hereby affirmed, for the reasons stated in the opinion of the District Judge without consideration of the other presented defenses to the action, but without prejudice to such other remedy, if any, as plaintiff may have with respect to the warehouse erected by plaintiff upon the premises of the State Board of Charities and Corrections of the commonwealth of Kentucky."

The question, therefore, of whether the action was against the State of Kentucky was not considered.

Petitioners further refer to the case of State vs. District Court of Salt Lake County, 102 Utah 284, 115 P. (2d) 913, on rehearing, 102 Utah 290, 128 P. (2d) 471. The concurring opinion of Mr. Justice Larsen is quoted to the effect that an action "should lie against the party who has the money. *Such party is not the state under the provisions of the statute.*" We submit that the pleadings in the instant cases affirmatively show that these actions are not against the party who has the tax monies alleged to have been unlawfully collected. Pursuant to the provisions of Section 80-5-71, the occupation taxes collected by the State Tax Commission were promptly paid over to the State Treasurer. As alleged by the complaints, said protested monies are being retained by the State Treasurer, as required by Section 80-11-13, until it shall have been determined whether the tax was lawfully or unlawfully collected. (R. 10, 124). It is of further interest to note that there is no majority opinion of the court in the case just referred to, the majority court being agreed only on the proposition that the state "had consented to be sued in a tax recovery matter such as this." Mr. Chief Justice Moffat, however, who was assigned to write the opinion of the court, stated:

> "Just what distinction, functionally considered, there may be found to exist between the state and an authorized agency of the state may not be easy to define."

While it is true that Section 80-11-41 speaks in the alternative—the taxpayer may bring an action against the officer to whom the tax was paid or against the state, county

or municipality or taxing unit on whose behalf the same is collected—there can be no argument that the tax here involved was paid to "an officer." It is alleged, and the facts show that the taxes were paid by petitioners to the State Tax Commission—an agency of the state. Taxes paid to a county are usually paid to an officer thereof, hence, the provision that an action might be brought against an officer collecting the tax. Whether such an action would be a suit against the officer in his official or individual capacity need not be here considered since the suit is against the State of Utah through its agency, the State Tax Commission.

We submit that the actions here commenced by petitioners against the State Tax Commission and the members constituting said Commission for the recovery of taxes paid under protest were brought pursuant to statutory authorization and as such are suits against the State of Utah.

III.

THE MEMBERS OF THE STATE TAX COMMISSION ARE SUED IN THEIR REPRESENTATIVE CAPACITY AND NOT AS INDIVIDUALS.

The Circuit Court of Appeals was apparently unanimous on the proposition that the instant suits are against the State of Utah and not against the individual members of the State Tax Commission, since it was unnecessary to discuss the question of immunity of the state from suit unless the actions were considered to be against the state. Under the authority of Ford Motor Company vs. Department of Treasury, supra, we do not see how it can be contended that the members of the Tax Commission are sued individually.

As therein pointed out, the statutes prescribe the procedure for obtaining refund of taxes illegally exacted. The complaints carefully detail compliance with the provisions precedent to suit. Petitioners do not assert "any claim to a personal judgment against these individuals for the contested tax payments." Their claim is "for a 'refund,' not for the imposition of personal liability on individual defendants for sums illegally exacted." As further stated by the court:

> "And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Nor do we believe that the complaints in the instant matters plead any cause of action against the individual defendants but on the contrary reveal an intention to sue them in their representative capacity as the State Tax Commission. The title in each cause lists them as "constituting said State Tax Commission." It is not alleged that the members of the Tax Commission, or either of them, received or exacted payment of the taxes from the petitioners. On the contrary, it is specifically alleged that the defendant, State Tax Commission "exacted payment" of the amount of the taxes assessed, and that said payment was made to the Commission (R. 10, 124). Respondents' answer in each case admits that the State Tax Commission exacted payment of the tax involved and that said tax was paid to said State Tax Commission (R. 15, 129).

It is true that there is a distinction to be made between a suit brought against a state official as an individual and a suit brought against a state official in his representative

capacity. In the case of State by State Road Commission vs. District Court, supra, the members of the State Road Commission were not joined as parties defendant, either as individuals or in their representative capacity. The court held that in the event they should be joined as defendants —in their individual capacity—there would be no immunity from suit on the grounds that the state was the defendant. Under the principles announced in the case of Tindal vs. Wesley, supra, it would be possible to bring an action against state officers as individuals "to recover under general law possession of specific property likewise wrongfully obtained or held." There is no allegation or showing here that the individual defendants either collected or held at any time the taxes paid under protest by petitioners.

It is argued that the provisions of Section 80-11-13, Utah Code Annotated, 1943, place no responsibility upon the state for the reimbursement of defendants if they are held individually liable. That section requires the State Treasurer to retain all taxes paid under protest until it shall have been determined that said tax was lawfully or unlawfully collected. But in the event *it is* determined that the tax is unlawfully collected, the statute requires not only that the amount retained be refunded but that "any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the State Treasurer, or, in case it is necessary, a deficit for said amount shall be authorized. Section 80-11-12, Utah Code Annotated, 1943, provides that in any statutory action brought to recover taxes paid under protest, wherein judgment is entered for the return of any of said taxes, the plaintiff shall have judgment for the recovery thereof

"and lawful interest thereon." In the instant cases, petitioners not only claimed but were allowed by the District Court interest at the rate of 6% from the date the taxes were paid under protest.

Finally, petitioners argue that the "customary form of bringing an action against the State Tax Commission is to sue said Commission without joining the individual members unless relief is sought against such indivduals personally." The cases cited in support of such a proposition on Page 38 of petitioners' brief are, with the exception of Peterson vs. State Tax Commission, 106 Utah 337, 148 P. (2d) 340, all cases where a writ of review was obtained from the State Supreme Court to review the decision of the Tax Commission—such writ of review being authorized specifically by the statute. In the Peterson case, the Tax Commission was not a party to the original litigation but was joined only for the purpose of ascertaining the amount of the Inheritance tax to be paid. No pleadings were filed against the Commission and no judgment against it was sought.

The cases heretofore cited to the effect that these actions are, in fact, suits against the state all support the proposition that the actions against the officers are in their representative capacity and not as individuals.

CONCLUSION

By way of summary, we wish to reaffirm the following propositions:

1. The procedure authorized by Section 80-11-11, Utah Code Annotated, 1943, for the recovery of taxes paid under

protest does not constitute a waiver of the state's immunity from suit in the federal courts.

2. The use of the phrase "in any court of competent jurisdiction" in Section 80-5-76, as well as other sections of the statutes referred to, does not evidence any intent on the part of the state to waive its immunity from suit.

3. In the language of the opinion by the Circuit Court of Appeals, "it is not sufficient to say that there is nothing in the context of the statute to indicate that Utah did not intend to embrace the federal court in its waiver of immunity from suit. Before it can be sued in such courts, the statute must use language which evidences a clear intent to submit to the jurisdiction of federal courts." (R. 144.)

4. When the state actually intended to waive its immunity, it did so by providing that "the consent of the State of Utah is given to be named a party in any suit * * * brought in any court of this state or of the United States" with respect to the subject matter indicated. (Sec. 104-3-27, U. C. A. 1943.)

5. The State of Utah has not, by administrative interpretation or conduct, waived its immunity from suit under the Eleventh Amendment to the Constitution of the United States.

6. The State Tax Commission and the members thereof are sued only as representatives of the state, the state being the real party in interest and the one which will alone be affected or compelled to pay any judgment that might be rendered or to which will inure benefits to accrue or result

from any judgment against the mining companies.

We, therefore, submit that the decision of the Circuit Court of Appeals should be affirmed.

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APPENDIX

Utah Code Annotated 1943:

Section 80-5-67.

Every person engaged in the business of mining or producing metalliferous ore shall make and file with the tax commission, on or before the tenth day of February of each year, beginning with the year 1938, on forms furnished by the tax commission, a statement containing:

(1) The name, description and location of the mine or mining claim owned and operated by him during the preceding calendar year.

(2) The number of tons of ore mined during the preceding calendar year and the disposition made of the same.

(3) The total amount received during the preceding calendar year from the sale of ore and metals.

(4) If a deduction is claimed for milling, smelting, refining, marketing or transporting the ore or the products of the same from the place where produced to the place where sold, the amount of deduction claimed therefor.

(5) Such other reasonable and necessary information as the commission may require for the proper enforcement of this act.

Sec. 80-5-68.

"If any person engaged in the business of mining metalliferous ores refuses or neglects to make or deliver to the tax commission the statement required by this act, the tax commission must fix the amount of the occupation tax from the best information or knowledge it can obtain. The tax commission for the purpose of ascertaining the correctness of any return or

for the purpose of ascertaining the amount of occupation tax that should be fixed when a return has not been filed, shall have power to examine or to cause to be examined by any agent or representative designated by it for that purpose any books, papers, records, or memoranda bearing upon the matter required to be included in the return, and may require the attendance of any officer or employee of any corporation or person required by this act to make a return or the attendance of any other person having knowledge of any pertinent fact, and may take testimony and require proof material for its information."

Sec. 80-5-70.

The tax imposed by this act shall be due and payable on or before the first day of June of the year next succeeding the calendar year when the ore or metal is sold; *provided*, the tax commission may for good cause shown upon a written application of the taxpayer extend the time of payment of the whole or any part of the tax for a period of not to exceed six months. If an extension is granted interest at the rate of six per cent per annum shall be charged on the amount of the deferred payment of the tax.

Sec. 80-5-72.

Not later than the first Monday in May of each year, the tax commission shall fix the amount of occupation tax that each person shall pay. Immediately thereafter, the person whose occupation tax is so fixed shall be notified by mail, postage prepaid, addressed to his last known place of residence, of the amount of the occupation tax so fixed.

Sec. 80-5-73.

If any person feels aggrieved because of the amount of the occupation tax fixed by the tax commission he may apply to the tax commission by written petition within ten days after notice is mailed to him for a hearing and correction of the amount of the tax

so assessed, in which petition he shall set forth the reasons why such hearing shall be granted and the amount by which the tax should be reduced. The tax commission shall notify the petitioner of the time and place fixed by it for such hearing. After such hearing the tax commission shall make such order in the matter as may appear to it just and lawful and shall furnish a copy thereof to the petitioner.

Sec. 80-5-74.

Every decision of the tax commission shall be in writing and notice thereof shall be mailed to the taxpayer within ten days. All such decisions shall become final upon the expiration of thirty days after notice thereof shall have been mailed to the taxpayer, unless proceedings are taken within such time for a review by the supreme court upon writ of certiorari as herein provided, in which case it shall become final (1) when affirmed or modified by a judgment of the supreme court; (2) if the supreme court remands the case to the tax commission for a rehearing when it is thereafter determined as hereinabove provided with respect to the initial proceeding.

Sec. 80-5-77.

Before making application to the supreme court for a writ the full amount of taxes, interest and other charges audited and stated in the decision of the tax commission must be deposited with the tax commission and an undertaking filed with the commission in such amount and with such surety as the tax commission shall approve to the effect that if such writ is dismissed or the decision of the tax commission affirmed the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the case, or, at the option of the applicant, such undertaking may be in a sum sufficient to cover the taxes, interest and other charges, audited or stated in such decision, plus the costs or charges which may accrue against the applicant in the prosecution of said

case, in which event the applicant shall not be required to pay such taxes, interest and other charges as a condition precedent to his application for the writ.

Sec. 80-5-78.

If the tax imposed by this chapter or any portion thereof is not paid when the same becomes due, the tax commission may issue a warrant, in duplicate under its official seal, directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the taxpayer found within this county for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant.

Immediately upon receipt of said warrant in duplicate the sheriff shall file the duplicate with the clerk of the district court in his county, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the delinquent taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such duplicate is filed, and thereupon the amount of such warrant so docketed shall have the force and effect of an execution against all personal property of the delinquent taxpayer, and shall also become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly rendered by any district court and docketed in the office of the clerk thereof. The sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner as is prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in

executing the warrant, to be collected in the same manner.

Sec. 80-5-80.

An action for the recovery of any occupation tax due and unpaid or to foreclose a lien for the payment thereof on a mine or mining claim may be brought by the tax commission in any court of competent jurisdiction at any time within six years after the cause of action shall have accrued.

Sec. 80-5-82.

If any clause, sentence, paragraph or part of this act shall for any reason be by any court of competent jurisdiction adjudged to be invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph or any part thereof directly involved in the controversy in which such judgment has been rendered.

SUPREME COURT OF THE UNITED STATES.

Nos. 424-25.—October Term, 1945.

Kennecott Copper Corporation, Petitioner,
424 *vs.*
State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission.

Silver King Coalition Mines Company, Petitioner,
425 *vs.*
State Tax Commission; and J. Lambert Gibson, Roscoe E. Hammond, Milton Twitchell, and Heber Bennion, Jr., Constituting said State Tax Commission.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 25, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

Whether Utah has submitted itself to suit in the United States District Court for the District of Utah for the recovery of taxes alleged to be wrongfully exacted by that state is the ultimate issue brought here by these writs of certiorari. Petitioners' amended declaration in the present proceeding was filed against Utah.

Petitioners, corporations and citizens of New York and Nevada respectively, carry on mining businesses in Utah. That state imposes on those there engaged in the mining business an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold during the preceding calendar year. The State Tax Commission administers the Act. Utah Code Annotated 1943, §§ 80-5-63 to 80-5-82, inclusive. For the purposes of this opinion, it need only be said as to the facts which give rise to this litigation, that petitioners seek recovery of that portion of their occupation taxes for 1944 which

was calculated by the Tax Commission by including in the gross amount received by petitioners for their ore certain subsidies for war production paid to petitioners by the United States pursuant to an order of the Office of Price Administration, dated February 9, 1942, No. P. M. 2458. Petitioners assert that this subsidy should not be included in their occupational tax base. As the Tax Commission did include the subsidies in the base after administrative rulings which denied petitioners' claims, petitioners each paid the total tax levied, protested that portion thereof which was based upon the subsidy and brought suit in the United States District Court for the District of Utah against the State Tax Commission and the individuals "constituting" it as "members," for the recovery of the protested amount under sections of the Utah Code (1943), set out below, which petitioners claim authorize these proceedings.[1]

The causes present identical questions. They were consolidated for trial in the District Court and separate judgments were entered for plaintiffs against the "State Tax Commission, et al." for the amounts claimed. Separate appeals were perfected to the Circuit Court of Appeals. The cases were there briefed, argued and decided together but with separate judgments reversing the District Court with directions to dismiss without prejudice since it was a suit against the state without its consent. *State Tax Commission* v. *Kennecott Copper Corp.*, 150 F. 2d 965. On account of the importance of the issues, we granted certiorari to determine whether the basis of the decisions in *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, and *Ford Co.* v. *Department of Treasury of*

[1] Utah Code Anno. 1943, 80-5-76:

"No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof; *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933."

Id., 80-11-11 [this is identical with Revised Statutes of Utah, 1933]:

"In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license, or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same; and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest."

Indiana, 323 U. S. 459, encompassed the circumstances of these cases. A single opinion suffices here also.

Federal jurisdiction is claimed under diversity of citizenship and because the controversy arises under the Constitution and laws of the United States. The claim is that the inclusion of the subsidy in the tax base interferes with the War Power of Congress and the Emergency Price Control Act of 1942, 50 U. S. C. §§ 901, 902(e), by taxing the subsidy on surplus production over fixed quotas with the result that a part of the subsidy was diverted from its "sole purpose of insuring the maximum necessary production." See Revenue Act of 1942, §§ 209, 735, 56 Stat. 904, 907.

As we conclude that these suits are suits against Utah and that Utah has not consented to be sued for these alleged wrongful tax exactions in the federal courts, we express no opinion upon the merits of the controversy.

This is a suit against the state. Utah has established an adequate procedure for the recovery of taxes illegally collected. When the state collects a tax under protest, the money is segregated and held for the determination of the taxpayers' rights with provision for any deficiency for interest or costs to be paid by the state.[2] The Mining Occupation Tax makes the State Tax Commission the state agency for administration and collection of the Utah tax. The petitioners paid their taxes to the Commission under protest and brought these actions to recover the contested portion.

Petitioners alleged compliance with the act's requirements for reports, assessments and administrativ remedies with payment under protest of the controverted sums for Utah to the "State Tax Commission" only. The Commission, alone, is charged to have

[2] Utah Code Anno. 1943, 80-11-13:

"In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized."

"exacted final payment" and to have acquiesced in plaintiffs' demand in accordance with statutory requirements to show payment and protest on the Commission's books with resultant segregation of the funds collected from Utah's general funds.

As the suits were against the Commission and the members as "constituting" such Commission, were based upon the payment to the Commission as collector for Utah and sought recovery of the fund, sequestered by section 80-11-13, together with the interest and costs therein provided for, we are satisfied these are suits against Utah. *Mine Safety Appliances Co.* v. *Forrestal*, No. 71, 1945 Term; *Great Northern Ins. Co.* v. *Read*, 322 U. S. 47, 51; *Ford Co.* v. *Dept. of Treasury*, 323 U. S. 459, 462.

Upon the question of the consent of Utah to suit against itself in the federal courts for controversies arising under the Federal Constitution, little needs to be added to our discussion in the *Read* and *Ford* cases. Those cases declare the rule that clear declaration of a state's consent to suit against itself in the federal court on fiscal claims is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances.

Petitioners point to distinctions between the present cases and those to which reference has just been made. They call attention to the history of the section authorizing recovery of taxes unlawfully collected. Section 80-11-11 was enacted in 1896 without the inclusion of the state as a possible defendant. Laws of Utah 1896, Ch. CXXIX, Sec. 180, p. 466. It was amended in 1933 when the words "state" and "or other taxing unit" were added. Petitioners urge that since the phrase "in any court of competent jurisdiction" had been assumed to permit suits in the federal courts that practice should be read into the word "state" when that entity was made subject to tax suits.[3]

It is also urged that "any court of competent jurisdiction" has long been construed in the federal statutes as including both state and federal courts.[4] Our attention is directed to section 80-5-76

[3] These examples of suits in federal courts were cited: Bassett v. Utah Copper Co., 219 F. 811 (Section 80-11-11 was then Section 2684); South Utah Mines v. Beaver County, 262 U. S. 325 (Section 2684); Salt Lake County v. Utah Copper Co., 294 Fed. 199; Beaver County v. South Utah Mines & Smelters, 17 F. 2d 577.

[4] Shoshone Mining Co. v. Rutter, 177 U. S. 505, 506.

limiting statutory review of administrative decisions of the Mining Occupation Tax to the Supreme Court of the state while allowing suits for recovery of unlawful taxes paid under protest to "any court of competent jurisdiction."

For these reasons petitioners contend that the Utah statutes indicate an intention to permit suits against the state in federal courts. Furthermore, petitioners find significance in variations between the state statutes in the *Read* case and the *Ford* case on one hand and the Utah statutes on the other. Petitioners show that we place reliance in both cases on the procedural requirements of the respective statutes of Oklahoma and Indiana.[5] We said in those cases that since state laws could not affect procedure in federal courts, it was to be inferred that only state courts were included in the states' consent to suit.

The bases for inference advanced by petitioners might logically lead to a conclusion that Utah intended to submit the interpretation of its tax statutes to federal trial courts where controversies arise under federal law. On the other hand, it may be cogently argued that the practice of treating the federal courts as courts of competent jurisdiction under section 80-11-11 before the addition of the state as a possible defendant resulted from the fact that consent was not necessary for suits against counties and municipalities.[6] It could be urged that grants of jurisdiction to courts of competent jurisdiction by federal legislation for the benefit of litigants other than the United States are not persuasive as to the intent of a state to consent to suits in federal courts.[7] We are informed that Utah employs explicit language to indicate, in other litigation, its consent to suits in federal courts.[8] It is to be noted that the cases under consideration illustrate the disadvantage of deducing from equivocal language a state's consent to suit in the federal courts on causes of action arising under state tax statutes. The disadvantage referred to is that, if the merits were to be passed upon, the initial interpretation of the meaning

[5] 322 U. S. at 55; 323 U. S. at 465-66.

[6] Lincoln County *v.* Luning, 133 U. S. 529; Chicot County *v.* Sherwood, 148 U. S. 529. See Hopkins *v.* Clemson College, 221 U. S. 636.

[7] Compare Minnesota *v.* United States, 305 U. S. 382, 389.

[8] Utah Code Anno. 1943, 104-3-27:

"Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal . . ."

and application of a state statute would have to be made by a federal court without a previous authoritative interpretation of the statute by the highest court of the state. See *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 103-105.

We conclude that the Utah statutes fall short of the clear declaration by a state of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state.

Affirmed.

The CHIEF JUSTICE and Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER dissenting, with whom Mr. Justice DOUGLAS and Mr. Justice BURTON concur.

Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. "It is," wrote Lincoln in his First Annual Message, "as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department." 7 Richardson, Messages and Papers of the Presidents, 3245, 3252. Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.

Not so long ago this Court acted on the realization that "the present climate of opinion . . . has brought governmental immunity from suit into disfavor." *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391. Today the Court treats governmental immunity from suit as though it were a principle of justice which must be safeguarded even to the point of giving a State's authorization to be sued the most strained construction, whereby a federal court sitting in Utah is made to appear not a "court of competent jurisdiction." Thus, while during the last seventy-five

years, governmental immunity from suit, as a doctrine without moral validity, has been progressively contracted, the Court now takes a backward step by enhancing a discredited doctrine through artificial construction.

In doing so the Court also disregards the historic relationship between the federal and the State courts. It treats a federal court sitting in a State as though it were the court of an alien power. The fact is that throughout our history the courts of a State and the federal courts sitting in that State were deemed to be "courts of a common country." *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 222. As a result, federal rights were enforced in State courts and a federal court sitting in a State was deemed to be "a court of that State," even as to a litigation like that of a condemnation proceeding which would appear to be peculiarly confined to a State court. *Madisonville Traction Co.* v. *Mining Co.*, 196 U. S. 239, 255-56; Ex parte *Schollenberger*, 96 U. S. 369, 377; *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 171.

A State may of course limit its consent to suit in its own courts. It may do so by explicit language or by implication through procedural requirements and restrictions which could not be satisfied by a federal court sitting in the State. Such were the grounds of the recent decisions in *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, and *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459. These decisions, as the Court concedes, relied on procedural requirements of the respective statutes of Oklahoma and Indiana which the federal courts in these States could not meet. Therefore, those statutes impliedly granted the State's consent to be sued only in the State courts, for only these could meet the State's procedural requirements.

Utah made no restriction on the right to sue. The statute giving consent to suit merely requires the court in which suit may be brought to be a "court of competent jurisdiction." That the District Court for the district of Utah is otherwise a "court of competent jurisdiction" is not gainsaid. How could the State include the United States District Court in its consent to be sued in a "court of competent jurisdiction" short of stating explicitly that a "court of competent jurisdiction" shall include the federal courts? The opinion does not say that nothing short of such specific authorization to sue in the federal court gives the State's

consent to be sued there. But if such a formal requirement be the meaning of the present decision, it runs counter to a long course of adjudication and pays undue obeisance to a doctrine, that of governmental immunity from suit, which, whatever claims it may have, does not have the support of any principle of justice.